Supreme Court, U.S.
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No. _____

In the
SUPREME COURT OF THE UNITED STATES

JOE CARRABBA, JR., ET AL.,
Individually and on Behalf of
All Others Similarly Situated, *Petitioners*,

v.

RANDALL'S FOOD MARKETS, INC., *Respondent*.

On Petition For A Writ of Certiorari to the
United States Court of Appeals for the Fifth Circuit

APPENDIX

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IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 00-10520

JOE CARRABBA, JR., ET AL,

Plaintiffs-Appellants-Cross-Appellees,

vs.

RANDALLS FOOD MARKETS, INC.,

Defendant-Appellee-Cross-Appellant.

Appeals from the United States District Court
for the Northern District of Texas

May 22, 2001

Before JONES, DEMOSS, and BENAVIDES, Circuit Judges.

PER CURIAM:

The court has carefully considered this appeal in light of the excellent briefs, oral arguments, and pertinent portions of the record. Having done so, we find no reversible error of fact or law by the district court and affirm based on that court's conscientious, well-reasoned opinions, which will be published.

AFFIRMED.

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

JOE CARRABBA, JR., ET AL.,	§	
	§	
Plaintiffs,	§	
	§	
VS.	§	NO. 4:96-CV-651-A
	§	
RANDALLS FOOD MARKETS, INC.,	§	
	§	
Defendant.	§	

MEMORANDUM OPINION
and
ORDER

On October 26, 1998, the court conducted a non-jury trial on the issue of whether the employee pension benefit plan known as the Management Security Plan for Cullum Companies ("MSP"), of which the named plaintiffs and the class of persons they represent in this action ("Class") were participants, was "maintained by an employer primarily for the purpose of providing deferred compensation for a select group of management or highly compensated employees," as those words are used in 29 U.S.C. §§ 1051(2), 1081(a)(3), and 1101(a)(1). After having considered the contents of the Pre-Trial Order for Trial of Class Issue filed October 23, 1998, the evidence received at the non-jury trial (including contents of deposition summaries that were tendered by the parties), and the oral and written submissions by the parties,

the court has concluded that it cannot find from a preponderance of the evidence that the MSP was maintained by an employer primarily for such a purpose.

I.
Nature of Litigation and Events That Led to the Trial of the Issue Defined Above

Generally stated, this is an action brought by the named plaintiffs[1] claiming that Randalls Food Markets, Inc., as the successor employer sponsoring the MSP[2], failed to provide benefits due and owing to them and other persons similarly situated under the MSP when it terminated the plan. Plaintiffs contend that retirement benefits accrued under the MSP were wrongfully forfeited and withheld, and are being denied to them and others similarly situated in violation of the applicable provisions of the Employee Retirement Income Security Act of 1974 ("ERISA"), as amended, 29 U.S.C. §§ 1001-1461. They contend that the MSP was subject to the vesting, funding, trusteeship, and reporting provisions of ERISA; and, they seek to recover

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[1] The named plaintiffs are Carroll E. Brown, Robert H. Burrows, Jr., Joe Carrabba, Jr., Michael Chessmore, Dave Cooper, Willard P. Correll, Sr., A. Joe Cutrer, Roberto G. Fernandez-Vinas, Rafael Ferrer, Jr., Ed Fortner, Floyd E. Fulcher, Bettie J. Garrett, J. Bruce Gray, Everett G. Grosgebauer, Michael J.Hammer, Wylie B. Holmes, Ima Dell Irvin, William H. Mansfield,Jr., Arvil R. Martin, Jr., Sanford W. Maynard, Thomas 0. McCarthy, Craig McKnight, Joe W. Melton, Denise P. Miller, Jack D. Neal, Scott E. Peterson, Bruce Philpot, Gregory E. Smith, Jack W. Sprabary, James S. Standifer, Robert L. Stockton, Cherie J. Stowe, Loyd Wellesley, Barbara A. Williams, and Ricky Williams.

[2] The record does not make clear the relationship between Randalls Food Markets, Inc., and the MSP at the time the MSP was terminated. However, the effect of stipulations made by the parties is that Randalls Food Markets, Inc., will be deemed to have been the sponsoring employer of the MSP at the time of its termination and the entity that will be held liable if there was a mishandling of plan assets and obligations at the time of and after the termination of the plan.

individually and on behalf of those similarly situated the present value of what they maintain should have been their accrued, vested benefits as of the MSP's termination date, as well as prejudgment and post-judgment interest and attorneys' fees incurred by them in this action.

Defendant contends that plaintiffs and the other persons similarly situated received all, or more than, the benefits to which they were entitled under the MSP. According to defendant, the MSP is what commonly is called a "top hat" plan, which is statutorily defined as a plan "which is unfunded and is maintained by an employer primarily for the purpose of providing deferred compensation for a select group of management or highly compensated employees." 29 U.S.C. §§ 1051(2), 1081(a)(3), and 1101(a)(1). If the plan were to qualify as a top hat plan, it would be exempt from important ERISA requirements, including vesting, funding, trusteeship, reporting, and disclosure. Id.

On June 16, 1998, the court signed an order determining that this action should proceed as a class action for the determination of the issue of whether the MSP qualified as a top hat plan, with the remaining issues to be resolved by future proceedings, as appropriate. The court defined the Class as:

> All persons who on the date of the termination of the Management Security Plan for Cullum Companies, Inc., ("MSP") were participants in the MSP and were employed by Randall's Food Markets, Inc., and everyone who is a beneficiary of such a person who is deceased.

1/16/98 Order Certifying Class at 2. The only issue to be dealt with initially on a class basis was defined as follows:

> Was the Management Security Plan for Cullum Companies, Inc., "a plan which [was] unfunded and [was] maintained by an employer primarily for the purpose of providing deferred compensation for a select group of management or highly compensated employees," as those words are used in 29 U.S.C. §§ 1051(2), 1081(a)(3), and 1101(a)(1)?

Id. The court resolved summarily against plaintiffs and the Class the sub-issue of whether the MSP was unfunded within the meaning of 29 U.S.C. §§ 1051(2), 1081(a)(3), and 1101(a)(1). See 6/5/98 Mem. Op. & Order and 9/9/98 Order at 2. That left to be tried at the October 26, 1998, trial the sub-issue of whether the MSP was "maintained by an employer primarily for the purpose of providing deferred compensation for a select group of management or highly compensated employees," as those words are used in ERISA. The parties agreed that defendant had the burden of persuasion on that sub-issue.

II.
Nature and History of the MSP

The MSP was established in 1974 by Cullum Companies, Inc., to provide death and retirement benefits to some of the employees of Cullum Companies, Inc., and its subsidiaries. The parties agree that the MSP was an employee pension benefit plan within the meaning of 29 U.S.C. § 1002(2)(A) by virtue of the fact that it is a plan, fund, or program which was established or maintained by an

employer to provide retirement income to employees, or to provide for a deferral of income by employees for periods extending to the termination of covered employment or beyond.

The text of the plan as it initially existed is not in the record, though the record does contain a copy of an agreement between one of the plaintiffs and Cullum Companies, Inc., by which he became a participant in the plan (known at that time as the "Management Security Program").[3] There were two revisions of the plan, first in 1979 and then in 1984. The 1979 revision recited that the purpose of the plan was to "provide specific benefits to a limited group of management employees who contribute materially to the continued growth, development, and future business success of Cullum Companies, Inc. and its subsidiaries." Agreed Ex. 2 at 1. The 1984 version said the purpose of the plan was "to provide specified benefits to a select group of management and highly compensated employees who contribute materially to the continued growth, development and future business success of Cullum Companies, Inc. and its subsidiaries," and stated as the intention of Cullum Companies, Inc. "that this program and

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[3] The parties stipulated that a "true and correct copy of the 1974 basic plan document is identified as Carrabba Exhibit 88.11 10/23/98 Pre-Trial Order for Trial of Class Issue at 14. The document received into evidence as Agreed Exhibit 1 appears to be the same as Carrabba Exhibit 88. However, even though it bears the title "Cullum Companies, Inc. Management Security Agreement," the document shows on its face that it is only an agreement between Cullum Companies, Inc., and Joseph Carrabba, Jr. The first paragraph of the document says that it is an agreement being entered into "for the purpose of enrolling Employee in the Management Security Program (hereinafter referred to sometimes as MSPI)." Agreed Ex. 1 at 1. Perhaps there was no master agreement before 1979, and the MSP consisted of a series of individual agreements between Cullum Companies, Inc., and individual employees prior to 1979.

the individual plans established hereunder be administered as unfunded welfare benefit plans established and maintained for a select group of management or highly compensated employees." Agreed Ex. 3 at I-1. Each plaintiff and Class member was required, as a condition to becoming and remaining a participant in the plan, to defer a portion of his or her annual compensation.

Periodically Cullum Companies, Inc., distributed to employees eligible to participate in the MSP information pertaining to the plan. one of those items was a set of questions and answers, which said under the heading "Exactly What Is The Plan?" that:

> The Cullum Companies, Inc. Management Security Plan (CULLUM MSP) is a company approved and sponsored employee benefit program offered to a select group of key employees. If you elect to become a participant, CULLUM will pay you or your family certain portions of your salary in the event of your retirement or death.

Agreed Ex. 6. In a memo sent by Cullum Companies, Inc., to the plan participants in March 1990, the company gave the following description of the nature and purpose of the plan:

> The Management Security Plan is a Company sponsored benefit program offered once a year to Store Directors, Pharmacists, eligible staff members and current participants. This plan is designed. as a way to accumulate wealth on a before tax basis, cut your current tax liability and provide substantial retirement and survivor benefits.

Agreed Ex. 31.

The plan was managed and administered by an administrative committee, the members of which also served as the executive committee of Cullum Companies, Inc. The administrative committee, following recommendations made to it by the personnel office of the corporation, determined the identities of the employees of the company who would be invited to participate in the plan. That was done once a year. Generally, the employees who were identified by the personnel department as ones eligible to participate in the plan were approved by the administrative committee for participation.

The MSP was terminated in the year 1992 after Cullum Companies, Inc., was acquired by Randalls Food Markets, Inc., or one of its subsidiary or affiliated corporations.

III.

Intent of the Executive Officers of Cullum Companies, Inc. in Establishing the MSP

As Charles Cullum, one of the founders of Cullum Companies, Inc., testified, the intent of Cullum Companies, Inc., in establishing the MSP was to provide additional benefits in the form of deferred compensation to people who were key employees throughout the company. It was designed to meet the "top hat" provisions of ERISA. Throughout the plan's existence, the executives of the corporation intended the MSP to be a top hat plan, and thought it was. The company officials relied on the expertise of Fred F. Wiedemann and his associates in formulating the MSP and advising them to the end of insuring that it was a top hat plan, exempt from the ERISA requirements. Mr. Wiedemann informed Mr. Cullum by letter in January 1975

that ERISA "clearly exempts the Cullum Companies Management Security Plan from nearly all the provisions of [ERISA]." Defs.' Ex. 1. In an August 14, 1975, letter to Cullum Companies, Inc., Mr. Wiedemann represented to the corporation that the "requirements" of the top hat provisions of ERISA had been met "under your plan." Defs.' Ex. 2 at 2.[4]

Houston E. Holmes, Jr., who became general counsel of Cullum Companies, Inc., in 1972, participated in evaluating and approving the plan in 1974. In addition to becoming a member of the MSP, he served on the administrative committee that administered the plan. He concluded from his review in 1974 of the plan and its operation that it was a top hat plan. From the time the plan was adopted in 1974 until he ceased employment in 1992, his understanding was that the MSP was a top hat plan. There was no intent by Cullum Companies, Inc., to change the status of the plan by the adoption of the 1979 and 1984 revisions in the plan. Mr. Holmes considered that part of his job as general counsel of Cullum Companies, Inc., was to

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[4] The evidence suggests that there is a possibility that there was a miscommunication, or lack of communication, between Mr. Wiedemann and his associates, on the one hand, and Cullum Companies, Inc., on the other, concerning eligibility requirements actually used by Cullum Companies, Inc., in operation of the plan. In his January 7, 1975, letter Mr. Wiedemann said that the "Plan is designed so that it is restricted to a specific salary management level..." Defs.' Ex. 1. In fact, in 1974 and 1975, Cullum Companies, Inc., was offering enrollment in the plan to all salaried employees and all members of management. In Mr. Wiedemann's August 14, 1975, letter, he said that the MSP satisfied the requirement that the plan be maintained by an employer "primarily for the purpose of providing deferred compensation for a select group of management or highly compensated employees." Defs.' Ex. 2 at 1-2. The court cannot determine whether Mr. Wiedemann was writing in the context of the method by which the plan was actually being operated as opposed to a misunderstanding of the mode of operation of the plan.

maintain the MSP as a top hat plan; and, he was satisfied that the people who were admitted into the plan satisfied that general purpose.

IV.
The Nature of the Businesses of the Plan Sponsor

When the plan was adopted, Cullum Companies, Inc., was engaged in the food and drug retailing and distribution, meat packing, and real estate businesses. In 1974, Cullum Companies, Inc., and its subsidiaries operated 113 supermarkets in Nebraska, Iowa, South Dakota, Kansas, Missouri, Texas, and California; twenty-one drug stores and a wholesale food division in Dallas, Texas; and meat packing operations in Abilene and Midland, Texas. By 1978, Cullum Companies, Inc., had expanded, apparently through subsidiaries, into the institutional wholesale foods and real estate businesses. Its business operations remained basically the same until the mid-1980s when it sold its operations in the Midwest and in California, but made major expansions in its food and drug operations in the State of Texas, operating under the names "Tom Thumb-Page," "Tom Thumb," "Page Drugs," "Gooch Packing Company," and "Cullum Development Co."

Through a series of corporate reorganization transactions, Cullum Companies, Inc., became an affiliate or a subsidiary of Randalls Food Markets, Inc., in the summer of 1992. As a part of those transactions, the name of the company was changed to "Tom Thumb Food & Drugs, Inc." As of that time, the corporation and its subsidiaries operated thirty-six Tom Thumb-Page Food & Drug Centers (which are large combination stores that carry a broad range of merchandise offered to retail customers), twenty-two Tom Thumb Supermarkets, sixteen Page Super Drug Stores, three

Simon David full-service gourmet supermarkets, and one discount drug store operating under the name "Drugs Plus." And, the company had two distribution centers, one that had gone into operation in 1974 and the other in 1987, which supplied over seventy percent of the products sold in the company's retail stores. The merchandise was shipped from the distribution centers to the retail outlets by use of a large fleet of company-owned trucks, including more than one hundred unrefrigerated trailers and sixty-four refrigerated trailers.

The parties entered into a stipulation concerning the total number of employees of Cullum Companies, Inc., and its subsidiaries for the years 1974 through 1992. The total number was 5,000 in 1974, increasing to slightly more than 10,000 in 1981, and thereafter fluctuating between 9,000 to 11,000 through the year 1992. Approximately one-half of those employees, at least for the years 1980 through 1992, were part-time employees.

V.
The Employees of Cullum Companies, Inc. Who Were Eligible to Participate, And Those Who did Participate, in the MSP

The wording of the 1979 and 1984 versions of the MSP is broad enough to allow for participation in the plan of all otherwise eligible employees of all business activities of Cullum Companies, Inc., and its subsidiaries. However, in actual operation of the plan, participation in the plan was available only to certain employees of Cullum Companies, Inc., and its subsidiaries who worked in Texas in the corporate headquarters departments, the retail stores, the warehouses, and the field operations. The record does not reflect the total number of persons employed in Texas in those business activities at any point in time. The court

assumes that a very significant number of the total employees of Cullum Companies, Inc., and its subsidiaries during the years 1974 through 1984 were Texas employees, but in fact the court can only engage in speculation on that subject. However, the record indicates that after the mid-1980s, when Cullum Companies, Inc., sold its business activities in the Midwest and in California, the great majority, if not all, of the employees of Cullum Companies, Inc., and its subsidiaries were Texas employees who, if otherwise eligible, would be permitted to participate in the MSP.

From the beginning in 1974 through the date of the revision of the MSP in 1984, all salaried employees of the operations of Cullum Companies, Inc., to which the MSP applied were invited to participate in the plan. The nature of the grocery business is such that all employees who were salaried were in management at some level. In 1974 ten to twenty percent of the persons employed in the typical supermarket would be salaried. The salary information in the record before the court is incomplete. The information that has been provided shows that the MSP participants in the first year of its operation, 1974, had salaries ranging anywhere from $11,180.00 to $40,000.00 annually, with only one above $30,000.00, only three above $20,000.00, three at $20,000.00, and the remainder less than $20,000.00. More complete information is provided for the years 1975 through 1983. There appear to have been increases in salary levels each year during those years commensurate with the inflationary pressures existing at that time. By 1983 all but two of the plan participants were earning more than $20,000.00 per year, many had an annual salary in excess of $30,000.00, and several in excess of $40,000.00.

The executive officers of the corporation were slow to become involved as participants in the plan, particularly

those who were in the top salary range.[5] Executives who enrolled in 1974 were Mr. Badley, vice president/treasurer, with a salary of $27,500.00; Mr. Corn, vice president/district manager, with a salary of $18,500.00; Mr. Dawson, vice president/data processing, with a salary of $20,000.00; Mr. Hairston, executive vice president, with a salary of $40,000.00; Mr. Knutson, vice president/Page Drug, with a salary of $30,000.00; and Mr. Rutledge, vice president/director of internal audit, with a salary of $21,000.00. The next executive officer to become a participant was Mr. Evans, president and chief operating officer, who joined in 1976, when his salary was $80,000.00. Next came Mr. Cutrer, executive vice president/Rylanders, whose salary when he joined in 1979 was $37,500.00. The next executive to join was Mr. Holmes, vice president/general counsel, who became a participant in 1982 when his salary was $70,000.00. The next, and final, executive officers to become members were Mr. Charles Cullum, chairman of the board, who became a member in 1984 when his salary was $250,000.00, Mr. Gooch, president/Gooch Packing, in 1984 when his salary was $125,000.00, and Mr. Garretson, vice president/grocery merchandising, in 1984 when his salary was $67,500.00."[6]

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[5] The parties stipulated that in 1974 "the Company" (which the court assumes has reference to Cullum Companies, Inc.) established another retirement plan, the second one known as the "Senior Corporate officers, Plan," which, according to the stipulation, was a plan for high-level executives, had fewer than seven members, all of whom were members of the board of directors or executive committee members, and was non-contributory. 10/23/98 Pre-trial order for Trial of Class Issue at 15. The trial record does not contain further information concerning the purpose of, or benefits provided by, this second plan.

[6] The court is not mentioning employees who became participants in the plan when occupying a lower level of management but later were promoted to executive positions. For example, omitted is Mr. Brooks

All levels of management were represented by the participants in the plan during the years 1974 through 1983, starting with executive officers of the company, going down to division managers (who managed more than one store), to store directors (or store managers), to co-store directors (co-store managers), to assistant store directors (assistant store managers), and to managers of departments within the stores, managers in the warehousing operations, managers in the executive office operations, and supervisors over various other business functions.

Starting in 1984, to become a new participant in the MSP the employee had to have an annual salary of at least $25,000.00. That eligibility criteria existed during the years 1984, 1985, and 1986. During those years the range of levels of management participating in the plan and the range of salaries of participants, taking into account the naturally occurring across the-board increases in salaries, were similar to the ranges existing in prior years. Throughout the years 1974 through 1986, Cullum Companies, Inc., considered everyone who had any level of management to be a key employee of the company. The goal was to make participation in the MSP available to all of those key employees.

The eligibility requirements for participation in the plan were tightened in the year 1987, and again in the years 1988, 1989, 1990, and 1992. In 1987 eligibility was limited to (1) store directors and pharmacists at retail locations, (2) employees at the Inwood Road Center (the executive office of Cullum Companies, Inc.) who were either officers,

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Cullum, who became a member of the plan in 1974 when he was a division manager earning a salary of $23,000.00 per annum, and who, by no later than the 1979 plan year, was a vice president with a salary of $42,000.00.

division managers, merchandisers, department directors, assistants to department directors, or persons with a base salary minimum of $45,000.00, and (3) all then-current MSP participants (as of January 1, 1987) who did not meet the new eligibility requirements (who were to be allowed to continue to participate in the plan without any modification). The only changes in 1988 were to add a new subcategory of "field merchandisers" to the "Inwood Road Center" group, to eliminate from the general "Inwood Road Center" group the subcategory having to do with a base minimum salary of $45,000.00 annually, and to add a new general category "Selected Key Staff with a base salary minimum of $50,000.00 annually." Agreed Ex. 10. In 1989 the base minimum salary was raised to $55,000.00; in 1990 it was raised to $60,000.00; and in 1992 the "pharmacists" designation in the "Retail Location" group was changed to "full-time pharmacists." Agreed Ex. 14. Otherwise, the eligibility criteria stayed the same.

The record does not reflect, on an annual basis or otherwise, the number of employees of Cullum Companies, Inc., who were eligible to participate in the MSP under the criteria for participation as they existed from time to time. However, there is indication in the record that there probably were a significant number of persons eligible to participate who did not actually participate. Apparently the eligible employees had to be sold on the notion of participating in the MSP. The largest new enrollment in the MSP was in the year 1984, after the benefits were improved, while the company was growing rapidly, and had "a new insurance consultant that did a better job presenting the program to eligible people." Tr. 50-51. The number of new enrollments in the plan each year, starting with 1974 going through 1991, were as follows: 1974, 57 new enrollees; 1975, 17 new enrollees; 1976, 15 new enrollees; 1977, 5 new enrollees; 1978, 1 new enrollee; 1979, 55 new enrollees; 1980,

51 new enrollees; 1981, 16 new enrollees; 1982, 34 new enrollees; 1983, 2 new enrollees; 1984, 168 new enrollees; 1985, 67 new enrollees, 1986, 98 new enrollees; 1987, 27 new enrollees; 1988, 18 new enrollees; 1989, 8 new enrollees; 1990, 13 new enrollees; and 1991, 23 new enrollees. Perhaps as an indication of a shift in the emphasis of the corporation's business, all but thirteen of the new enrollees in the years 1987 through 1991 were pharmacists or pharmacy managers.

As new participants joined the plan, some of the existing participants terminated participation for one reason or another. The net cumulative numbers of participants in the plan on a plan year basis are as follows: 1974, 57 participants; 1975, 68 participants; 1976, 72 participants; 1977, 70 participants; 1978, 63 participants; 1979, 113 participants; 1980, 153 participants; 1981, 160 participants; 1982, 188 participants; 1983, 186 participants; 1984, 346 participants; 1985, 395 participants; 1986, 447 participants; 1987, 441 participants; 1988, 431 participants; 1989, 356 participants; 1990, 331 participants; 1991, 328 participants; and 1992, 297 participants (with 247 participants on the date when the plan was terminated).

All of the MSP participants were viewed by the officials of the corporation to be important to the day-to-day operations and activities of the company. As a group, they were all important to the business and policy decisions of the company. Starting with the changes made in 1987, the changes in the criteria for eligibility to participate in the plan were in response to a thought by the officials of the corporation that the plan should be more restrictive, and because of profit pressure.

Nevertheless, throughout the MSP's existence the enrollees in the plan were persons thought by officials of the corporation to be members of corporate management or

highly compensated individuals. (The levels of compensation for employees in the grocery and related businesses are historically lower than in other industries.)

The decision to allow persons to remain in the plan who were not qualified under newly adopted criteria[7] was prompted primarily because the officials of the company considered those persons to still be valuable members of management--they were still valuable to the company, and it would have been a devastating morale blow for them to be denied the opportunity to continue to participate in the plan. Initially, the administrative committee decided that participants in that category could continue to participate but that their level of participation would not increase as their salaries increased. However, there were so many complaints from those participants about their benefits being frozen that the administrative committee changed its mind, and allowed those who were "grandfathered" in the plan to have full participation thereafter.

In a few instances, a plan participant who was demoted to a position that if held when the employee entered the plan would have caused him or her not to be eligible for participation at the time of his or her entry, was allowed to continue to be a plan participant. Consequently, anyone who became a participant in the plan was allowed to continue as a participant, no matter what change there might have been in his or her job status (except, of course, participation terminated when employment terminated).

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[7] The written documentation indicates that the grandfathering of participants who did not qualify under newly adopted criteria applied only to participants who were in the plan as of January 1, 1987, see Agreed Exs. 9-14; but, in practice the grandfathering applied to all participants who did not meet new criteria, including criteria adopted after 1987.

The administrative committee never had a formal definition of "management" to guide them in determining eligibility for participation in the MSP. Similarly, it had no standard to guide it in determining which employees would be considered "highly compensated employees," other than the standards mentioned above-all salaried personnel until 1984, and from 1984 through 1992 the salary minimums mentioned above, beginning at $25,000.00 in 1984 and going to $60,000.00 starting in 1990. Neither the administrative committee nor anyone else in a position of authority with Cullum Companies, Inc., attempted to be more selective in the choice of employees to participate in the MSP than to apply the selection criteria that have been mentioned above in this section of this Memorandum Opinion and order.

Other than the one instance mentioned above of a change in plans relative to benefits for "grandfathered" participants, no evidence was offered to suggest that the participants in the MSP were able to influence the benefits to be provided under the MSP or any of the terms of the MSP, or tried to exercise any such influence. The court cannot find from the evidence that any participant in the MSP, with the possible exception of the few executive officers of the corporation who were participants, had the bargaining power to influence the benefits or other terms of the MSP in any respect.

With, perhaps, de minimis exceptions, all persons eligible to participate in the MSP were a part of the management of Cullum Companies, Inc., or one of its subsidiaries, at one management level or another. And, again with de minimis exceptions, and bearing in mind the salary levels expected in business operations of the kind in which Cullum Companies, Inc., and it subsidiaries were engaged, all participants in the MSP could be viewed to be "highly compensated employees."

VI.
Pertinent Legal Authorities

As previously noted, the statutory standard defendant's proof was required to meet at trial was that the MSP was "maintained by an employer primarily for the purpose of providing deferred compensation for a select group of management or highly compensated employees." 28 U.S.C. §§ 1051(2), 1081(a)(3), and 1101(a)(1). The Fifth Circuit explained, in a different context, that statutory words must be given meaning. See Spacek v. Maritime Ass'n., 134 F.3d 283, 289 (5th Cir. 1998). The definition of a top hat plan has been described as a narrow one. See In re New Valley Corp., 89 F.3d 143, 148 (3d Cir. 1996), cert. denied, 117 S. Ct. 947 (1997). In applying the statutory language, the court must take into account that "ERISA is a remedial statute to be liberally construed in favor of employee benefit fund participants," and that exemptions from the ERISA coverage should be confined to their narrow purpose. Kross v. Western Elec. Co., Inc., 701 F.2d 1238, 1242 (7th Cir. 1983).

"[T]op hat plan participants, unlike ordinary pension plan participants, are typically high-ranking management personnel" who "are therefore better equipped than ordinary pension plan participants to effectively protect their interests in the employee benefits bargaining process. Spacek, 134 F.3d at 296 n.12. "This is the very reason that Congress chose not to subject top hat plans to ERISA's vesting, accrual, participation, and fiduciary requirements." Id. The Department of Labor's view of the reason for, and justification of, the top hat exemption was expressed as follows:

> [In providing relief for "top hat" plans from the broad remedial provisions of ERISA, Congress recognized that certain

> individuals, by virtue of their positions or compensation level, have the ability to affect or substantially influence, through negotiation or otherwise, the design and operation of their deferred compensation plan, taking into consideration any risks attendant thereto, and therefore, would not need the substantive rights and protection of Title I [of ERISA].

Id. (quoting Dep't of Labor Op. Ltr. 90-14A).

The enactment by Congress of ERISA was a recognition that the employees to be aided by ERISA lacked the bargaining power to obtain nonforfeitable benefits through contractual negotiations. See Gallione v. Flaherty, 70 F.3d 724, 727 (2d Cir. 1995). In the course of explaining how a top hat plan fits into the ERISA scheme, the Second Circuit said:

> As one method of accomplishing the goal of decreasing the number of lost pensions, ERISA established certain minimum requirements that covered plans must meet, including requirements for nonforfeitability, i.e., vesting. However, Congress made ERISA's vesting provisions inapplicable to any plan "which is unfunded and is maintained by an employer primarily for the purpose of providing deferred compensation for a select group of management or highly compensated employees." 29 U.S.C. § 1051(2). *See also id.* § 1081(a)(3) (excepting such plans from ERISA's funding requirements); id. § 1101(a)(1) (excepting such plans from ERISA's fiduciary

> responsibility requirements). Dubbed a "top hat" plan, such a plan was excluded from ERISA's vesting, funding, and fiduciary responsibility requirements because Congress deemed top-level management, unlike most employees, to be capable of protecting their own pension expectations.

Id.

A legitimate top hat plan must cover a "select group" of employees who are "only high-level employees." In re New Valley Corp., 89 F.3d at 148. The mere fact that the employer intends the plan to be a reward to "key" employees does not satisfy the degree of selectivity contemplated by the statutes. See Hollingshead v. Burford Equip. Co., 747 F. Supp. 1421, 1429 (M.D. Ala. 1990). Rather, the statute contemplates that a top hat plan will be for the benefit of "high-ranking employees." See Bigda v. Fischbach Corp., 898 F. Supp. 1004, 1015 (S.D.N.Y. 1995), aff'd, 101 F.3d 108 (2d Cir. 1996).

VII.
Application of the Law to the Facts of this Case

The decision the court has concluded it must reach in this case, that defendant has not met its burden to establish that the MSP was a top hat plan, is made difficult by the acceptance by the court of the evidence that Cullum Companies, Inc., at all times intended the MSP to be a top hat plan and operated on a good-faith belief that it so qualified. The court is satisfied that at no time did the corporation or any of its officials act with an improper motive or with any design to cheat or otherwise financially

abuse its employees or to cause them to receive less than the benefits to which they were entitled under the law. And, the court is satisfied that at all times Cullum Companies, Inc., and its officials, including the members of the administrative committee, conducted themselves in relation to the MSP with the goal in mind to be fair to the participants in the administration of the plan.

Unfortunately, however, notwithstanding the good intent of Cullum Companies, Inc., and its officials, the court simply cannot find from the evidence that the MSP was maintained by Cullum Companies, Inc., and its subsidiaries "primarily...for a select group of management or highly compensated employees."[8] The words "a select group of" must be given some meaning. Quite candidly, the court questions whether it can articulate the meaning of the words "a select group," as used in the statute. The furthest the court can go is to express the conclusion that it cannot find from the evidence that the participants of the MSP were "a select group" out of the broader group of management employees or the broader group of highly compensated employees.

Perhaps, as the Department of Labor and some of the court decisions have suggested, the "select group" test is whether the members of the group have positions with the employer of such influence that they can protect their retirement and deferred compensation expectations by direct negotiations with the employer. The evidence does not persuade the co-art that any significant number of the participants in the MSP individually had bargaining power of that kind. Of course, as a group, to the extent that they could act cohesively, they undoubtedly could influence the

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[8] The court does not reach the issue of whether the MSP was maintained "primarily for the purpose of providing deferred compensation."

design and operation of the MSP, but that would be true of any group of employees within a company.

As sympathetic as the court is with the attempts by Cullum Companies, Inc., to be fair with its employees in the design and application of the MSP, the court cannot find from the evidence that defendant has proved by a preponderance of the evidence that the MSP was maintained for a select group of management or highly compensated employees, as those words are used in ERISA.

Therefore,

VIII.
ORDER

The court ORDERS and DECLARES that the MSP was not "maintained by an employer primarily for the purpose of providing deferred compensation for a select group of management or highly compensated employees," as those words are used in 29 U.S.C. §§ 1051(2), 1081(a)(3), and 1101(a)(1).

SIGNED February 18, 1999.

/s/ John McBryde
JOHN McBRYDE
United States District Judge

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

JOE CARRABBA, JR., ET AL.,	§	
	§	
Plaintiffs,	§	
	§	
VS.	§	NO. 4:96-CV-651-A
	§	
RANDALLS FOOD MARKETS, INC.,	§	
	§	
Defendant.	§	

MEMORANDUM OPINION
and
ORDER

The background of this litigation and its history through mid-February 1999 are set forth in the memorandum opinion the court signed February 18, 1999, Carrabba v. Randalls Food Markets, Inc., 38 F. Supp.2d 468 (N.D. Tex. 1999), the contents of which are adopted by reference. Since mid-February 1999, the court has held proceedings to the end of resolving the remaining issues. A bench trial on those issues was conducted November 22, 1999.

A.
The Remaining Issues to be Decided

A conclusion that follows from the court's decision that the MSP did not qualify as a "top hat" plan is that the

members of the Class did not receive the financial benefits they should and would have received upon termination of the plan in 1992 if the plan sponsor had recognized that the MSP was subject to the accrual and vesting requirements of ERISA and had acted accordingly. By order signed July 13, 1999, the court certified for handling on a Class basis all issues that remained to be resolved in this action. The Class continued to be as previously defined. See Carrabba, 38 F. Supp.2d at 470. The court's task now is to fashion appropriate equitable relief, see 29 U.S.C. § 1132(a)(3)(B), for the Class to provide them financial benefits that will recognize the requirements of ERISA.

The parties are in serious disagreement over the nature and level of the benefits the court should afford the Class by way of equitable relief. Plaintiffs argue that the court should match the financial generosity they say the plan sponsor showed the plan participants over the years by providing equitable relief on the basis of a formula and calculation techniques that would produce a financial result they contend recognizes that generosity. And, plaintiffs maintain that, because of having kept and used in its business money that they say should have been paid to the participants, defendant should be required to share with the Class its business profits. In contrast, defendant maintains that the equitable relief should not extend beyond the difference between the financial benefits the Class would have received upon termination of the plan if the employer had complied with the minimum obligations ERISA imposed on the employer with respect to the plan and the payments the Class members actually received when the plan was terminated. Apparently, defendant concedes that it should pay prejudgment interest on that difference.

If the court were to adopt the approach urged by the Class, their award against defendant would be in excess of $100,000,000. In contrast, defendant is urging the use of a formula and calculation techniques that would produce for the Class an award of around $5,000,000 plus prejudgment interest. Each side's version of equity is sponsored by a seemingly well-qualified expert witness, Craig Dale Rogers ("Rogers") for the plaintiffs and Joe Huffman ("Huffman") for the defendant, each of whom maintains with apparent sincerity that a proper application of ERISA to the facts of this case supports the version of equity advanced by the side that employed him.

The starting point in the calculations of each side is the projected retirement benefits, as specified in agreements made between the plan sponsor and the participants, to be received by the respective participants upon retirement from the plan sponsor's employment at age 65. But the calculations of the parties have little in common beyond that starting point. Each expert witness presented alternative sets of calculations, with a preferred set as to each. Rogers's preferred set is under tab G of Agreed Exhibit 138. Huffman's is under tab A of Agreed Exhibit 139.

The preferred calculations of Rogers show an underpayment to the participants upon plan termination of $42,550,941. According to Huffman's preferred calculations, the underpayment was $4,802,863. This large discrepancy is attributable primarily to the following differences in calculation techniques, factors, and assumptions used by the experts:

1. Rogers used in his calculations a straight-line, current compensation accrual method, and the benefits were accrued over years of service with the plan sponsor rather

than years of participation in the plan.[1] In contrast, Huffman used a career average accrual method, with the accrual calculated on the basis of years of participation in the MSP rather than years of employment with the plan sponsor.[2]

2. Rogers assumed in his calculations that all participants, regardless of years of participation in the plan, became 100% vested in their accrued benefits when the plan was terminated. Huffman used a five-year cliff vesting (as contemplated by 29 U.S.C. § 1053(a)(2)(A)) assumption in his calculations.[3]

3. Rogers assumed in most of his sets of calculations full accrual by age fifty-five.[4] Huffman used in his calculations a retirement age of sixty-five.

4. Rogers used the applicable Pension Guarantee Benefit Corporation ("PBGC") rate in his present value calculations, whereas Huffman used 120% of the PBGC rate in all instances where the present value exceeded $25,000.

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[1] Rogers performed alternative calculations that assumed as to each participant that the full benefits the participant was to receive under the MSP upon retirement were accrued on the date the plan terminated, without regard to the participant's tenure of employment or years of participation in the plan.

[2] Huffman performed alternative calculations using the straight-line accrual method.

[3] Huffman performed alternative calculations based on the assumption that all participants were 100% vested on the date of termination of the plan.

[4] In some of Rogers, calculations he assumed full accrual by age fifty-five, but that payment of retirement benefits would not start until age sixty-five. In his preferred calculations, Rogers assumed full accrual by age fifty-five, and that the retirement payments would commence at that age.

5. Rogers did not use a mortality factor (which would take into account the possibility that a participant would die prior to retirement date) in his calculations of present value. Huffman did.

6. Rogers used a plan termination date of August 24, 1994,[5] (which is the earliest date when defendant could have terminated the plan if it had honored a contractual commitment it made to the initial plan sponsor) in his preferred calculations rather than to use the actual date of termination of December 31, 1992. Huffman used in his preferred calculations the actual date of termination.[6]

In addition to the calculation disputes, the following issues must be resolved:

1. (a) the rate to be used in the calculation of prejudgment interest (interest calculated from the actual or assumed date of termination of the MSP through the date of entry of judgment) on the underpayment amounts the court determines the members of the Class should receive from defendant, and (b) whether the interest should be compounded;[7]

2. the effect, if any, on the claims at issue of release documents certain members of the Class executed

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[5] Rogers presented an alternative preferred calculation, under tab H of Agreed Exhibit 138, in which a December 31, 1992, termination date was used. That calculation produced a $34,767,517 underpayment number.

[6] Huffman performed an alternative set of preferred calculations using an August 24, 1994, termination date, which produced an underpayment number of $6,637,556.

[7] Defendant seems to concede that there should be an award of prejudgment interest, but disputes the rate urged on behalf of the Class and the contention of the Class that there should be compounding.

and delivered to defendant upon termination of employment;

3. whether the members of the Class should be awarded a share of the profits defendant made from its use of funds that would have been paid to the Class if defendant had properly determined vested accrued benefits and paid them at the time the plan was terminated;

4. whether the employees who would have been properly included as participants in a "top hat" plan should, for that reason, be denied recovery of additional termination benefits;[8] and

5. the amounts, if any, to be awarded the Class against defendant as attorneys, fees and other litigation expenses.[9]

B.

The Plan Document and Related Plan Agreements

Because the MSP was intended to be a top hat plan exempt from ERISA requirements, it was not drawn as a plan in compliance with ERISA. The MSP lacked the vesting and accrual provisions mandated by ERISA. See 29 U.S.C. §§ 1053(a) and 1054(a) and (b). There was no provision for accrual or vesting prior to a participant's actual retirement of

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[8] Plaintiffs contend that all participants should share in the recovery. Defendant maintains that equity compels exclusion of the participants who could have been in a top hat plan.

[9] The court and the parties have proceeded on the basis that the procedural requirements of Federal Rule of Civil Procedure 54(d)(2) have been satisfied as to the claim by plaintiffs for recovery of attorneys, fees from defendant under 29 U.S.C. § 1132(g)(1).

any of the financial contributions the MSP contemplated the employer would make to the projected retirement benefits.

The normal retirement benefits provided by the MSP, and some of the conditions to receipt of those benefits, were specified by the plan document as follows:

> 4.1 Normal Retirement. If a Participant has remained an Employee until age sixty-five (65) and shall then Retire, and if this Program and his Plan Agreement have been kept in force, the Company will pay or cause to be paid to such Participant as a Retirement Benefit (herein so called), the amount per month specified in his Plan Agreement, commencing on the first day of the month following such Participant's retirement, or as otherwise specified in his Plan Agreement.

Agreed Ex. 3 at IV-1. The words "Retirement" and "Retire," as used in the plan, were defined by the plan to mean "severance of employment with the Company at or after the attainment of age sixty-five (65)." Id. at I-2.

By separate plan agreements, which were annexes (Annex I's) to the MSP, the projected retirement benefits commencing at age 65 for the respective plan participants were specified. An example of the standard language defining the amount of the retirement benefits (except for differences in the dollar amount) used in these agreements is as follows:

3. Retirement Benefit:

(a) Retirement at age 65 - $148,200

This amount to be paid in 120 equal monthly installments (or as otherwise mutually agreed by the Participant and the Committee) following age 65 or following retirement, as determined by the Committee.

Agreed Ex. 3, Annex I at first and second pages. Each plan agreement went on to specify the dollar amount to be deducted from the participant's compensation each month as the contributions of the participant, by way of compensation deferrals, to the cost of the retirement benefit. Id. at second page. Thus, payment of the compensation deferrals by a participant was a further condition to receipt of the retirement benefits of the MSP.

The plan document expressly gave the employer "the right to terminate...[the plan] at any time," Agreed Ex. 3 at X-1, except as to any participant who was in pay status under the plan by reason of retirement, Id.[10] According to the plan document, termination of the plan caused the employer to have no further obligation under the MSP. Id. A participant's right to receive a retirement benefit under

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[10] The annexes also addressed plan termination, saying:

> [T]he Plan and this Plan Agreement may be terminated at any time, in the sole discretion of the Company, without any obligation of any nature whatsoever to the Company, except a Participant shall have those rights provided for the extent such may be applicable to him at the time of such termination.

Agreed Ex. 3, Annex I at third page.

the plan was said by the plan document to "be forfeitable at all times prior to the date that he first satisfies the requirements for Retirement hereunder." Id. at IV.

2. Specifically, the plan said that "no portion of a Participant's Retirement Benefit shall accrue to him prior to the date that he first satisfies the requirements for Retirement hereunder." Id.

An early retirement benefit, "in an actuarially reduced amount," was described in the plan document, but the determination of the amount as to a particular participant was left to the "sole and absolute discretion" of the retirement plan committee. Agreed Ex. 3 at IV-1. A later document provided by the employer to the plan participants established a formula for determination of early retirement benefits. Pls., Ex. 6 at 2. The benefits were to be a percentage of the normal retirement benefit, determined by age at retirement and years of service. Id.

As the court has previously ruled, the MSP was an unfunded retirement plan. 6/5/98 Mem. Op. & Order; 9/9/98 order. Retirement benefits were to be paid from the general assets of the employer. Agreed Ex. 3 at VII-1.

The annexes provide with respect to the employer's financial obligations upon termination of the MSP that:

> Upon any termination of the Plan, the Company, after payment of all involuntary termination benefits, may in its absolute discretion pay any additional benefits the Committee may determine.

Agreed Ex. 3, Annex I at third page. The paragraph of the annex that immediately precedes the language that is quoted

above makes clear that the term "involuntary termination benefits" has reference to "an amount equivalent to all of [the participant's] deferrals to the Plan." Id. Thus, prior to a participant's retirement pursuant to the terms of the plan, the only accrued or vested interest a participant had under the plan was in his or her deferred compensation contributions.

C.

Representations Made by the Plan Sponsor-Employer

Plaintiffs maintain that written and verbal representations made by the employer to the plan participants from time to time were the equivalent of amendments to the plan document and plan agreements. However, the court cannot find that any representation was made by the employer to the participants that would justify a reasonable belief by the participants that, in any respect relevant to the issues presented here, their rights under the MSP were greater than, or different from, the rights and obligations described in the plan document and the plan agreements, as set forth above.

D.

The Payments That Were Made Upon Termination of the MSP

If the terms of the MSP and related documents had been followed, the only payment defendant would have been obligated to make to any non-retired participant upon termination of the plan would be the total amount of his or her deferred contribution payments. However, the official of defendant, Bobby Louis Gowens, ("Gowens") who calculated the amounts to be paid to the participants when

the plan was terminated disregarded the employer's payment obligations under the plan and related documents, and arbitrarily arrived at a formula for determining the amounts to be paid. His formula gave all participants some credit for the number of years of service he or she had, and took into account the total amount of the contributions of the participants by way of compensation deferrals.

Gowens said that his calculations were not based on what the MSP plan documents said, but simply were what he thought the "people ought to receive."[11] Narrative Summary of Deposition Testimony of Bobby Gowens at 3. Many, if not most, of the payments he caused to be made were more than the MSP required. The underpayments calculated by the expert witnesses are the amounts they, respectively, concluded the participants should have received over and above the payments made pursuant to the calculations of Gowens for, in the respective views of the expert witnesses, the requirements of ERISA to be properly recognized.

E.

The Relief to be Granted by the Court is Equitable Relief–Not a Recovery Under the Plan

Plaintiffs maintain that they are entitled to recover under the authority of 29 U.S.C. § 1132(a)(1)(B) benefits due them under the terms of the MSP. If recovery under the terms of the MSP were the nature of plaintiffs, action, they would recover very little because there is no evidence that

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[11] The discretionary calculations were, in fact, consistent with the authority the plan sponsor had to pay to participants upon termination of the plan "any additional benefits" it, in its "absolute discretion," might choose to pay. Agreed Ex. 3, Annex I at third page.

upon termination of the MSP they did not receive basically everything to which they were entitled under the provisions of the MSP. The remedy of the Class lies instead in the grant of appropriate equitable relief, as contemplated by 29 U.S.C. § 1132(a)(3)(B), to address violations of, and to give effect to, the accrual and vesting provisions of ERISA. In deciding the equitable relief to be granted, the court is taking into account all the facts and circumstances described in Carrabba v. Randalls Food Markets, Inc., 38 F. Supp.2d 468 (N.D. Tex. 1999), as well as all the evidence received during the course of both trial proceedings conducted in this case.

The court has concluded that equity would be served in this case if the members of the Class were to be placed in basically the same financial position in which they would be if the employer had complied with the minimum requirements necessary for the MSP to satisfy the accrual and vesting provisions of ERISA[12] and if the underpayments made to the Class were to be determined on an assumed August 24, 1994, date for termination of the MSP (bearing in mind the contractual commitment of defendant not to terminate the plan prior to that date).

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[12] The court recognizes that in certain instances over the years the employer provided benefits to the plan participants that exceeded the employer's obligations under the MSP, and, that the retirement benefits, when earned under the MSP, were often generous. However, the court cannot find that there was a pattern of conduct that would justify a conclusion that equity would be served by awards in excess of those the court is granting. With exceptions that are not material to the conclusions expressed in this opinion, the MSP was administered in accordance with its provisions over the years of its operation. As a rule, before the plan was terminated, the persons whose participation in the MSP ended prior to their retirement received only the return of their deferrals.

F.

Defendant Has Not Established
That Any Member of the Class Released
His or Her Claim

In return for a severance payment based on years of service and accrued vacation time, some participants, when terminating employment with defendant after the MSP was terminated, signed a document releasing and discharging defendant "from all claims, liabilities, demands and causes of action, known or unknown, fixed or contingent, which [they might] have or claim to have against [defendant] as a result of [their] employment and this termination." E.g., Agreed Ex. 110 at first page. An affirmative defense asserted by defendant against those participants is that the documents they signed released defendant from liability as to the claims being asserted in this action.

The validity of a waiver of pension benefits under ERISA is subject to closer scrutiny than a waiver of general contract claims. Sharkey v. Ultramar Energy, Ltd., 70 F.3d 226, 231 (2d Cir. 1995). Courts scrutinize an ostensible waiver with care in order to ensure that it reflects the purposeful relinquishment of an employee's rights. Smart v. Gillette Co. Long-Term Disability Plan, 70 F.3d 173, 181 (lst Cir. 1995). In other words, a "knowing and voluntary" test is applied. Sharkey, 70 F.3d at 231. The burden is on the defendant to show that a plaintiff intentionally relinquished or abandoned a known right or privilege. Smart, 70 F.3d at 181-82.

In this case, the court cannot find that defendant has met its burden as to any of the plaintiffs. In particular, there is no evidence that any of the plaintiffs understood that they were releasing claims relating to the MSP, which had been

terminated on December 31, 1992, long before the execution of any of the releases. The facts of this case are thus distinguishable from those in the cases cited by defendant. See, e.g., Morais v. Central Beverage Corp. Union Employees' Supplemental Retirement Plan, 167 F.3d 709 (1st Cir. 1999) (settlement of suit on improper calculation of disability pension barred second such suit); Wittorf v. Shell Oil Co., 37 F.3d 1151 (5th Cir. 1994) (plaintiff who specifically threatened to revoke release of ERISA claims but failed to timely take action could not later sue on those claims); Mange v. Petrolife Corp., 960 F. Supp. 206 (E.D. Mo. 1997), aff'd, 135 F.3d 570 (8th Cir. 1998) (signers who knew company position about vacation pay could not claim release did not affect vacation pay rights).

The indication from the evidence is that neither party to the waiver/release documents gave any thought to the MSP or any claims arising under the MSP when the documents were drawn, signed, and delivered. There is certainly no basis in the evidence for any finding that any signatory on such a release/waiver document intended by execution and delivery of the document to release defendant of any claim that is being asserted in this action.

G.

Eligibility to Participate in a "Top Hat" Plan
Is Not An Equitable Reason for Denial of Recovery

The court is not persuaded that equity compels exclusion from recovery in this action of those participants in the MSP who could have properly been included as participants in a top hat plan. Consistent with the principle underlying ERISA that, as a general proposition, an employer should provide uniform treatment to participants in a retirement plan, Frontier Airlines, Inc. v. Frontier

Airlines, Inc., Pilot's Pension Board (In re Frontier Airlines, Inc.), 84 B.R. 724, 729 (Bankr. D. Colo. 1988), the court has concluded that all participants in the MSP should be given uniform treatment in the calculations of the awards to be made to the participants against defendant and the granting of those awards.

H.

"Profits" Made by Defendant Are Not to Be Included in the Awards

The court has concluded that equity does not compel an award to the members of the Class against defendant of any amount that would represent profits made by defendant from its use of funds that it would have paid to the Class if it had honored ERISA's accrual and vesting requirements at the time the plan was terminated. The factors the court considered in determining the relief to be granted plaintiffs against defendant are sufficient to satisfy the demands of equity. There is no need, from an equitable standpoint, to include in each of the awards a speculative number based on the notion that defendant's business ventures would not have been as profitable after the date the plan was terminated if defendant had recognized that the MSP was not a top hat plan and had made termination distributions to the participants on a basis that took into account the requirements of ERISA.

I.

Equitable Resolutions of the Calculation Disputes of the Experts

The approach of plaintiffs and their expert to the calculations of the awards to be made to the plaintiffs misinterprets, for the most part, the goals of ERISA. After

having related the facts that led to the passage of ERISA, Congress concluded the first paragraph of its findings and declarations of policy with the following words:

> [I]t is therefore desirable in the interests of employees and their beneficiaries, for the protection of the revenue of the United States, and to provide for the free flow of commerce, that minimum standards be provided assuring the equitable character of such plans and their financial soundness.

29 U.S.C. § 1001(a) (emphasis added). And, in the final paragraph of its findings and declaration of policy, Congress explained that the policy of ERISA was "to protect...the interest of participants in private pension plans...by improving the equitable character and the soundness of such plans by requiring them to vest the accrued benefits of employees with significant periods of service..." Id. § 1001(c) (emphasis added). The court concludes that, generally speaking, giving the participants the benefit of the "minimum standards" of ERISA would satisfy the policy behind ERISA by "assuring the equitable character" of the MSP. Id. § 1001(a).

Once the equitable character of the MSP has been assured by calculations that define the payments that would be required to satisfy the minimum standards of ERISA, there will have been a great stride toward the objective of fashioning the appropriate equitable relief the court is empowered to grant by 29 U.S.C. § 1132(a)(3)(B). Thus, with exceptions to be noted, the court has concluded that the minimum standards of ERISA should be recognized, and given effect, in the calculations. The court's task in that

regard is simplified to a degree by the concession of Rogers that if his "mission statement was...to calculate only benefits that would not be forfeitable under ERISA," he would have done the same thing Huffman did in his calculations. 11/22/99 Tr. at 111. Rogers, in effect, admitted that the products of Huffman's calculations are the amounts that defendant would have been obligated to pay to the participants upon termination of the plan if the MSP had satisfied the minimum standards of ERISA. Id. at 109-11.

1. The Accrual Methods that Should be Used In the Calculations.

As a defined benefit plan, the MSP should have satisfied one of the three accrual schedules set forth in 29 U.S.C. § 1054(b)(1). Plaintiffs, expert witness, Rogers, proposes for use in the damage calculations a straight-line, current compensation accrual method of the kind contemplated by 29 U.S.C. § 1054(b)(1)(C), while defendant's expert witness, Huffman, advocates use of a career average accrual method that satisfies the requirements of 29 U.S.C. § 1054(b)(1)(B). Each expert said his selection was based on his assessment of the method that most closely resembles the progression of MSP benefits he observed in the actual operation of the MSP over the years.

Due to the absence of an accrual method in the plan, the court is called upon to select for use in the calculations of the awards to be made to the participants against defendant one that, in equity, most appropriately recognizes the objectives of the MSP in an ERISA context. The court finds that the accrual method advocated by Huffman is the one that should be used for that purpose. That Huffman's method of accrual is not expressed in the MSP and was never used during the operation of the MSP is neither

surprising nor relevant. Because the employer thought the MSP was not subject to ERISA accrual requirements, the plan contained no accrual method, and there was never an occasion under the terms of the plan to calculate an accrual (except to the extent that deferred compensation payment calculations for a terminating employee might be viewed to be such).

2. Years of Participation in the Plan Rather Than Years of Service Should be Used in the Calculations.

The court fails to perceive the logic in the use by Rogers of years of service with the employer rather than years of participation in the plan in his calculations. On the other hand, Huffman's use of years of participation in the plan in his calculations makes sense in the light of the language of the MSP.

The MSP provided that as a condition to participation in the plan, and receipt of benefits under the plan, an employee had to make contributions by way of compensation deferrals. Such contributions were made only during the employee's participation in the plan, not during the years of employment prior to plan participation. Under the terms of the plan, a "Participant" was "an Employee who is selected and elects to participate in the Program through the execution of a Plan Agreement..." Agreed Ex. 3 at I-2.

There is nothing in the MSP plan document or the related agreements to suggest that years of employment was a factor in determining benefits to be received under the MSP, while, as noted, there is indication that years of participation in the plan was a factor. The court has

concluded that Huffman correctly used years of participation in the plan in his calculations.

3. The Normal Retirement Age of Sixty-Five Should be Used in the Calculations.

No plausible rationale was provided by Rogers for his use of the early retirement age of fifty-five for all participants in his calculations. The court has concluded that early retirement benefits are not required to be taken into account in determining accrued benefits under ERISA, and that Huffman correctly used the normal retirement age of sixty-five in his calculations.

4. The Methods Used BV Huffman to Determine Present Value Are Proper.

The court is satisfied that if the plan sponsor had realized that the MSP did not qualify as a top hat plan, and, therefore, had complied with the vesting and accrual standards of ERISA, the retirement plan would have included provisions authorizing use of the discount techniques employed by Huffman to determine present values. The MSP reflects an intent to minimize the obligations of the employer upon termination of the plan. Therefore, the court considers it appropriate, when converting the plan sponsor's obligations to ERISA-based termination obligations, to apply the minimum standards for determining present value that could have been adopted by the employer. Equity will have been served in this case by the use of 120% of the PBGC rate in the present value calculations in all, instances where the present value exceeds $25,000, and by the use of a mortality factor in the making of those calculations.

5. The 100% Vesting Assumption Should be Used.

The court finds that the five-year cliff vesting formula used by Huffman is acceptable under ERISA, and that it was a formula commonly used by employers. However, the court finds that the most equitable approach to vesting would be to consider that all participants became 100% vested at the time of plan termination. Such a 100% vesting would have been required if the MSP had been a tax-qualified plan. For this purpose, the court assumes that the employer would have caused the plan to be tax qualified if the employer had been aware that the plan was subject to the accrual and vesting standards of ERISA.

6. A Plan Termination Date of August 24, 1994, Should Be Used.

The parties are in agreement that if defendant had honored an agreement it made with the initial plan sponsor at the time defendant purchased the sponsor, the defendant would not have terminated the plan before August 24, 1994. Without reaching the issue of whether the participants in the plan were beneficiaries of some nature of defendant's contractual commitment, the court has concluded that it would be inequitable for the plan participants to be totally denied relief from the consequences adverse to them of such a premature termination of the plan.[13]

Therefore, the court, in fashioning appropriate equitable relief for the Class, is going to be guided by the

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[13] In reaching the conclusion that August 24, 1994, should be used as the termination date, the court has taken note that Gowens, in making his calculations of the termination benefits that were actually paid, recognized and took into account to a degree the fact that defendant had promised not to terminate the plan before August 24, 1994.

calculations of Huffman that are identical to his preferred calculations except for the changes required to convert to 100% vesting and the changes he was required to make to convert from a December 31, 1992, termination date to an August 24, 1994, termination date. The applicable set of calculations is the alternative set that is under Tab L of Agreed Exhibit 139. Those calculations show that the total amount of the underpayments to the Class is $6,745,409, determined as of August 24, 1994. In making those calculations, Huffman properly took into account salary deferrals that would have been required on the part of the plan participants until August 24, 1994, and properly discontinued accruals from date of termination of employment of all participants whose employment terminated between December 31, 1992, and August 24, 1994. The final judgment to be entered in this action will have an allocation of the total amount of the underpayments to those members of the Class who experienced underpayments.

J.

Prejudgment Interest

Both sides recognize that prejudgment interest should be awarded in this case if there is an award of underpayments. Plaintiffs seek 10%, compounded annually; defendant argues that the Texas 6% contract rate, calculated as simple interest, should be used. The United States Court of Appeals for the Fifth Circuit says that "when awarding prejudgment interest in an action brought under ERISA, it is appropriate for the district court to look to state law for guidance in determining the rate of interest." Hansen v. Continental Ins. Co., 940 F.2d 971, 984 (5th Cir. 1991). However, "state law is not binding but merely provides

guidance" and "it is within the discretion of the district court to select an equitable rate of prejudgment interest." Id.

Recently, the Texas Supreme Court has addressed the matter of prejudgment interest in cases like this one where the matter is not specifically addressed by statute. Johnson & Higgins of Tex., Inc. v. Kenneco Energy, Inc., 962 S.W.2d 507 (Tex. 1998). That court has held that, under common law, prejudgment interest begins to accrue on the earlier of (1) 180 days after the date a defendant receives written notice of a claim or (2) the date suit is filed. Id. at 531. And, prejudgment interest accrues at the rate for post-judgment interest and is computed as simple interest. Id. at 532. Pursuant to TEX. FIN. CODE ANN. § 304.003 (c) (Vernon Supp. 2000), the post-judgment interest rate now applicable is 10% per annum, since the auction rate quoted on a discount basis for fifty-two-week Treasury bills issued by the United States government is less than 10%.

The parties make no arguments as to the date from which prejudgment interest should accrue. Plaintiffs could argue that the time runs from 180 days after March 12, 1993, the date demand was made by persons similarly situated to plaintiffs. See Pls.' Sixth Am. Original Compl., Ex. C. Defendant, on the other hand, could argue that the time should run from the date suit was filed, since plaintiffs themselves did not make written notice of a claim. The court has determined that August 25, 1994, the day after the assumed date of plan termination, should be the date that prejudgment interest begins to accrue.

According to calculations performed by the court, the total of the prejudgment interest chargeable in favor of the Class against defendant is $3,801,454.42 through the date of the signing of this order. The court anticipates that the final

judgment to be entered in this action will show an allocation to each Class member who experienced an underpayment his or her share of the prejudgment interest.

K.

The Appropriate Equitable Relief Being Granted to the Class

The court has concluded that appropriate equitable relief for the Class, and the individual members thereof, will be provided by the award to the members of the Class against defendant of the underpayments in the total amount of $6,745,409 as set forth in the set of calculations under Tab L of Agreed Exhibit 139 plus prejudgment interest thereon consistent with this memorandum opinion. That relief will provide to the members of the Class essentially the same financial benefits they would have received if the plan sponsor had recognized, and given effect to, the accrual and vesting requirements of ERISA and had honored its contractual commitment to continue the MSP in effect until August 24, 1994.

L.

Attorneys' Fees and Other Litigation Expenses

ERISA provides that "[i]n any action under [ERISA]...by a participant...the court in its discretion may allow a reasonable attorneys' fee and cost of action to either party." 29 U.S.C. § 1132(g). When considering whether a statutory fee award is appropriate, the court should consider the following factors: (a) the opposing party's degree of culpability or bad faith; (b) the opposing party's ability to satisfy an award of attorneys, fees; (c) whether an award of attorneys' fees against the opposing party would deter other persons acting under similar circumstances; (d) whether the

party requesting attorneys, fees sought to benefit all participants and beneficiaries of an ERISA plan or to resolve a significant legal question regarding ERISA itself; and, (e) the relative merit of the parties' positions. Todd v. AIG Life Ins. Co., 47 F.3d 1448, 1458 (5th Cir. 1995); Iron Workers Local No. 272 v. Bowen, 624 F.2d 1255, 1266 (5th Cir. 1980). No one factor is determinative. Bowen, 624 F.2d at 1266.

Plaintiffs adduced evidence through the testimony of their lead counsel, Robert L. Wright, and exhibits (Agreed Exhibits 178 and 179) that through early November 1999 (slightly more than two weeks prior to the final trial session) plaintiffs had incurred attorneys' fees in the amount of $2,889,743.40 through lawyers with Mr. Wright's firm. Each side used at trial an independent attorney as an expert witness on attorneys, fees, Bill Bowers by the plaintiffs and Jim Barlow by the defendant. The indication from the testimony is that each of the attorney-experts thoroughly familiarized himself with this case and the work done by the firm with which Mr. Wright is associated.

Mr. Wright explained in his testimony the reasons why the lawyers with his firm devoted the time they did to the prosecution of this case, and why that work was necessary to pursuit of the claims being made in this action. He discussed applicability of the facts of this case to each of the Johnson[14] factors. The only question posed to Mr. Wright on cross-examination was whether the value of Mr. Wright's time shown on one of the agreed exhibits was calculated by use of his firm's current hourly rate or by use of the hourly rates in effect as of the time the hours were worked, to which Mr. Wright responded that the hourly rates used were those in use when the case started.

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[14] Johnson v. Georgia Highway Express, Inc., 488 F.2d 714 (5th Cir. 1974).

Mr. Bowers testified that the fees incurred by plaintiffs through Mr. Wright's firm about which Mr. Wright had testified are reasonable in this area, and that the time expended by the attorneys was necessary under the circumstances. After having given consideration to the Johnson factors, Mr. Bowers expressed the opinion that an appropriate fee to be received by counsel for the plaintiffs would be twice what the fee charges would be at the normal hourly rates of the attorneys. The sole objective of the cross-examination of Mr. Bowers seems to have been to develop testimony that would persuade the court that Mr. Bowers was incorrect when he expressed the belief that the fees awarded to plaintiffs should be twice the amount derived from use of the normal per-hour rates charged by counsel for the plaintiffs. None of the cross-examination intimated that defendant took issue with the necessity for counsel of plaintiffs in the pursuit of the claims being asserted by plaintiffs in this action to do the work about which Mr. Wright testified his firm did or the reasonableness of the per-hour rates charged for that work.

Mr. Barlow's testimony was directed exclusively to the issue of whether defendants should be required to pay as attorneys' fees more than fees derived from an application of the normal per-hour rates of counsel for the plaintiffs to the time they devoted to the case, all as developed through the testimony of Mr. Wright. His opinion was that there should not be an adjustment up or down on the fees charged by counsel for the plaintiffs, as reflected by their billing statements that were received into evidence as exhibits. He made clear that the opinion he expressed was limited to the issue of whether there should be a recovery by plaintiffs from defendant of attorneys' fees above the lodestar amount and was not directed to the issue of whether counsel for the plaintiffs should be entitled, under the trust fund doctrine,

to receive something above the lodestar from the Class members. Mr. Barlow said that he was not saying by his testimony that counsel for the plaintiffs are not entitled, based on the circumstances of this case, to recover more than their normal per-hour rates, only that the defendant ought not to be required to pay that excess. Defendant's expert did not question the necessity for the accomplishment of any of the work about which Mr. Wright testified, or the reasonableness of any of the charges made by the attorneys for any of that work.

In addition to giving testimony about services rendered by his firm, Mr. Wright identified during his testimony a list of disbursements made by his firm in the total amount of $373,491.93 and an exhibit (Agreed Exhibit 180) that showed time devoted by his co-counsel, Thomas F. Dunn, to work on the case, Mr. Dunn's charges for that time, and expenses incurred by Mr. Dunn's firm. There was no further evidence concerning the disbursements made by Mr. Wright's firm, the work done by Mr. Dunn, or the expenses incurred by Mr. Dunn's firm. No evidence was provided that any of those items were reasonable in amount or that any of the work, disbursements, or expenses were necessary to the prosecution of the claims asserted on behalf of the Class in this action. There was no testimony that would enable the court to conclude that Mr. Dunn's work was not duplicative of the work done by the lawyers in Mr. Wright's firm. Throughout Agreed Exhibit 180 there are entries that Mr. Dunn reviewed documents that apparently were prepared by the other attorneys. There was no evidence that Mr. Dunn's review of those documents contributed at all to the pursuit of the claims asserted in this action. Consequently, the court cannot find from the evidence that there should be any recovery for the disbursements, Mr. Dunn's fees, or the expenses incurred by Mr. Dunn's firm.

However, the court has concluded that the evidence supports a recovery by the Class of the attorneys' fees for work done by Mr. Wright and the lawyers with his firm, as reflected by Agreed Exhibits 178 and 179.

The only argument made by defendant in its post-trial brief against an award to plaintiffs from defendant of attorneys, fees based on normal per-hour rates applied to work actually done is that the court should take into account that plaintiffs are not the prevailing party in the damage phase of this lawsuit. Consequently, the court is not devoting attention to the other factors mentioned in Todd and Bowen other than to note that the court has considered all those factors and has concluded that, in balance, they support an award of attorneys' fees to plaintiffs from defendant. And, the court rejects the argument advanced by defendant in its post-trial brief that plaintiffs are not the prevailing party in the damage phase of this case. As plaintiffs point out in their reply brief, plaintiffs have been successful in many of the issues that have been presented to the court for resolution since conclusion of the liability phase of this case. Pls.', Reply to Defs.' Post-Trial Br. at 38-39.

While the court has not accepted all of the damage theories advanced by counsel for the plaintiffs in support of a larger award, the court is not prepared to say that any damage contention made on behalf of the plaintiffs has been frivolous or made in bad faith. The court is inclined to think that all such contentions were made in a good-faith belief on the part of counsel for the plaintiffs that they were obligated to make the contentions in order to adequately present plaintiffs, case to the court for resolution. The court concludes that plaintiffs were the prevailing party in the damage phase as well as the liability phase of this action.

The court finds that the attorneys' fees incurred through Mr. Wright's firm about which trial evidence was received were necessary to be incurred in the prosecution of plaintiffs, claims against defendant in this action and that all are reasonable in amount to be charged in this geographical area. Therefore, there being no basis in the evidence for a reduction below the lodestar amounts, an award is being made to plaintiffs against defendant for recovery of those fees.

However, the court has concluded that plaintiffs should not recover from defendant any enhancement over the lodestar amounts. Any recovery beyond that would tend to have a punitive effect on defendant. There has been no evidence of any conduct on the part of defendant that would cause the court to believe that defendant should be saddled with attorneys, fees or legal expenses incurred by plaintiffs beyond those that plaintiffs themselves would have paid if they had made timely payment at the usual per-hour rates charged by counsel for the plaintiffs. However, the court reserves for future decision the issue of whether, under the trust fund doctrine, counsel for the plaintiffs should recover some additional amount as attorneys, fees from the Class.

Mr. Wright gave testimony in support of an award to plaintiffs against defendant of attorneys' fees at the district court level beyond the last work reflected by Agreed Exhibits 178 and 179 and for attorney work anticipated in the event of an appeal to the Fifth Circuit and in the further event of an appeal to the United States Supreme Court, saying:

> [W]e anticipate that the amount of time spent trying the case, attending to post-trial

> matters, including motions and briefing and whatever the Court would desire there, together with the amount of time that we would spend in the event of an appeal to the Fifth Circuit, and a further appeal, if allowed to the United States Supreme Court, we're estimating that the total fees for all of that would be an additional $250,000.

Tr. of 11/22/99 trial at 135-36.

The court concludes that it should not make an award for anticipated legal expenses on appeal. If an appeal is taken, the Court of Appeals can deal with the issue of whether attorneys' fees should be awarded for time devoted to such an appeal, either by making the award itself or by directing this court to revisit that issue post-appeal.

In order to resolve the matter of possible recovery by plaintiffs for attorney time devoted to the representation of the Class through the district court beyond the attorney time shown on Agreed Exhibits 178 and 179, the court has signed two orders since the November 22, 1999, trial for the purpose of causing the record to be completed on that matter, one signed March 16, 2000, and the other signed March 24, 2000. The court is accepting as supplementations of the trial record the items submitted for filing by counsel for the Class pursuant to those orders.

In response to the March 16 order, counsel for the plaintiffs made a submission of updated legal expenses showing that (a) the charges for legal services rendered by Mr. Wright's firm from November 4, 1999, through March 13, 2000, are in the total amount of $325,086.50, (b) the

additional disbursements through Mr. Wright's firm are in the total amount of $135,571.06, (c) the charges for services rendered by Mr. Dunn from November 11, 1999, through February 3, 2000, are in the total amount of $6,737.50, and (d) the additional expenses incurred by Mr. Dunn are in the total amount of $34.28.

Mr. Wright says in an affidavit submitted by counsel for the plaintiffs pursuant to the March 24, 2000, order that his clients do not seek recovery as attorneys' fees of the newly listed disbursements of $135,571.06. Inasmuch as there is no evidentiary basis for an award against defendant of any of those disbursements, the court is not allowing recovery of any of them. As no evidentiary basis was provided for an award of the additional fees and expenses incurred through co-counsel Dunn, the court is not making any award based on those fees and expenses.

However, even though the court has concluded that the submitted amount of additional attorneys, fees incurred through Mr. Wright's firm appears to be excessive, the court has concluded that there should be an award of what the court finds to be fees that are reasonable in amount for the additional services that were necessary to prosecute the claims of the plaintiffs. As a starting point, the court has broken down the additional fees incurred through Mr. Wright's firm into three time period categories, the first covering the November 4, 1999, through November 21, 1999, time period, the next covering the date of trial, November 22, 1999, and the third covering the post-trial time period of November 23, 1999, through March 13, 2000. The attorneys' fees incurred by Mr. Wright's firm during the first time period are in the amount of $121,584.50 out of the $325,086.50 total. Mr. Wright's firm charged $9,982.50 for work devoted to this case on the date of trial. The remaining

$193,519.50 out of the $325,086.50 total represents time counsel for plaintiffs say Mr. Wright's firm has devoted to this case since the November 22 trial.

Based on Mr. Wright's affidavit,[15] the court's knowledge of the history of this case and the work done by counsel in the case as reflected by the filings with and appearances before the court, the court's awareness of the legal fees normally charged in this area, and an independent evaluation by the court of the amount of time counsel for the plaintiffs reasonably should have devoted to representation of the Class post-Agreed Exhibits 178 and 179 and the fee charges that should be made for that time, the court makes the following findings and expresses the following conclusions relative to the work done by Mr. Wright's firm commencing on November 4, 1999, and going through March 13, 2000:

(a) the court finds that $121,584.50 is a reasonable charge to be made in this area for the work necessary to be done on behalf of the plaintiffs by way of trial preparation during the November 4, 1999, through November 21, 1999, time period;

(b) the court finds that $9,982.50 is a reasonable amount in this area for the attorneys with Mr. Wright's firm to charge for work necessary to be done on behalf of the plaintiffs in this case

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[15] Though invited by the court to do so, defendant did not respond to Mr. Wright's affidavit or the submission by plaintiffs, counsel of updated legal expenses. See Order of 3/24/00 at 4.

on November 22, 1999, the date of trial;

(c) the court finds that $57,500 is a reasonable charge in this area for work necessary to be done by the attorneys with Mr. Wright's firm in the representation of plaintiffs in this case during the November 23, 1999, to March 13, 2000, time period;

(d) the court concludes, after having considered the factors outlined in Todd and Bowen, that the fee amounts mentioned in (a), (b), and (c) immediately above should be awarded to plaintiffs against defendant; and

(e) the court concludes, after having considered the Johnson factors, that there should be no further adjustment up or down from the lodestar amount in the award made to plaintiffs against defendant for recovery of such attorneys' fees.

For the reasons given above, the judgment of the court will award plaintiffs recovery of $3,078,810.40 as attorneys, fees. The plan of the court is for the judgment to be entered to allocate this award between the Class members on a pro rata basis.

M.

Judgment to be Entered

A judgment will be entered pursuant to this memorandum opinion and order resolving all claims that remain in this case other than a claim for recovery of attorneys, fees and other litigation expenses from the Class by counsel for the plaintiffs. In pursuit of that claim, counsel for plaintiffs must file an appropriate motion. The court tentatively has concluded that independent counsel will have to be retained to represent the Class against present counsel for the plaintiffs on that claim. And, the court tentatively has concluded that, if an appeal is taken by either side in this action, the claim for recovery by counsel for the plaintiffs from the Class should be held in abeyance until such an appeal has been concluded. Otherwise, the time devoted to that issue could, and probably would, be wasted if this court's judgment were to be reversed or modified on appeal, bearing in mind that the outcome of a claim by Class counsel for compensation from the Class will depend, at least in part, on the ultimate success plaintiffs experience in their claims against defendant.

So that the claim that remains unresolved cannot be viewed to be an impediment to an appeal at this time, the court determines that there is no just reason for delay in, and hereby directs, entry of final judgment as to all claims and issues that were resolved by the memorandum opinion and order the court signed February 18, 1999, in this action and all claims and issues that are being resolved by this memorandum opinion and order. The final judgment will be rendered and subject to entry when a written final judgment is signed by the court.

ORDER

Consistent with the foregoing memorandum opinion and order,

The court ORDERS that the Class have and recover $13,625,673.82 from defendant (representing $6,745,409.00 as underpayments reflected by the calculations under Tab L of Agreed Exhibit 139, $3,801,454.42 as interest on the underpayments, and $3,078,810.40 as attorneys, fees);

The court further ORDERS that plaintiffs have and recover from defendant costs of court incurred by plaintiffs; and

The court further ORDERS that, by April 18, 2000, the parties jointly present to the court by a filed document the text of a proposed final judgment to which they have agreed as to form, drawn consistent with this memorandum opinion and order, and in which there is an award to each member of the Class against defendant of his or her share of the recovery contemplated by this memorandum opinion and order.

SIGNED April 11, 2000.

/s/ John McBryde
JOHN McBRYDE
United States District Judge

Respectfully submitted,

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